

Internal Revenue Service
Director, Exempt Organizations

Department of the Treasury
P.O. Box 2508 - Room 4122
Cincinnati, Ohio 45201

Release Number: **201015033**
Release Date: 4/16/10
Date: 1/20/2010

Employer Identification Number:

Person to Contact - ID#:

Contact Telephone Numbers:

Phone
Fax

UIL
4942.03.07

LEGEND

A= State
B= Trust
C= Settlor of Trust
D= Public charity 1
E= Public charity 2
\$x= Contingent set-aside amount

Dear

By letter dated June 30, 2009, you requested approval of a contingent set-aside under section 53.4242(a)-3(b)(9) of the Foundation and Similar Excise Taxes Regulations for the taxable year ending June 30, 2009.

FACTS

You are incorporated under the laws of the state of A and are a private nonoperating foundation described in section 509(a) of the Code. You were formed to promote awareness and knowledge regarding the American Civil War. You were funded from the residue of the trust estate of B upon the demise of its settlor C. Litigation arose between you and D, an organization exempt under Section 501(c)(3), which contested the disposition of the residual assets of B to you. In December of 1998 you came to an agreement with D to resolve the litigation. The settlement agreement includes provisions governing the provision of funding to D, and prohibiting D from attempting to dissolve you or attempting to amend the agreement otherwise than as it specifically provides. The agreement established a grant protocol which requires that D present to your Board its program, project and land acquisition priorities. Grant proposals which you receive from other public charities must be forwarded to D for prioritization. You agree, annually, to review all grant proposals so prioritized and select from among them those that you will fund in an amount not less than your "distributable income", as defined in Sections 4942(d) and (e) of the Code. The agreement permits you to fund projects not prioritized by D if D fails to submit sufficient projects to be approved according to the terms of the agreement.

E, the successor in interest of D through a merger, has filed suit against you for a declaratory judgment that it, E, is entitled to receive all your distributable income, and you filed a counterclaim for breach of contract and for a declaratory judgment requesting, among other relief, a ruling that you are no longer obligated to D in any manner, including a finding that you are no longer required to make your distributable income available to E to be distributed as it directs. Your position, in part, is that E is in breach of contract because it disregarded the grant protocol in failing to prioritize funding requests from other charitable organizations which you had forwarded.

The court that has jurisdiction over the lawsuit and counterclaim has entered an order prohibiting you from making distributions until the lawsuit is resolved. You have requested a set-aside of \$x, the remaining undistributed amount for the taxable year ending June 30, 2008, which the court order prevented you from distributing during the taxable year ending June 30, 2009. In the event the lawsuit is not resolved before June 30, 2010, you intend to request approval of a contingent set-aside for that taxable year in an amount equal to the undistributed income for the year ending June 30, 2009.

Section 53.4942(a)-3(b)(9) of the Foundation and Similar Excise Taxes Regulations provides that if a private foundation is involved in litigation and may not distribute assets or income because of a court order, the private foundation may (except as provided in section 53.4942(a)-2(e)(1)(i) or (ii) seek and obtain a set-aside for the purpose described in section 53.4942(a)-3(a)(2). The amount to be set-aside shall be equal to that portion of the private foundation's distributable amount which is attributable to the assets or income that are held pursuant to court order and which, but for the court order precluding the distribution of such assets or income, would have been distributed. In the event that the litigation encompasses more than one tax year, the private foundation may seek additional contingent set-asides. Such amounts must actually be distributed by the last day of the tax year following the tax year in which the litigation is terminated. Amounts not distributed by the close of the appropriate tax year shall be treated as described in section 53.4942(a)-2(d)(2)(iii)(c) for the succeeding tax year.

A court order prevents you from making distributions while this litigation is pending. These are precisely the circumstances described in section 53-4942(a)-3(b)(9) of the regulations. Accordingly, we rule that the requested set-aside is a contingent set-aside described in Section 53.4942(a)-3(b)(9)

We direct your attention to section 53.4942(a)-3(b)(4) of the regulations, entitled "Evidence of set-aside". That section provides that a set-aside approved by the Internal Revenue Service shall be evidenced by the entry of a dollar amount on the books and records of the private foundation as a pledge or obligation to be paid at a future date or dates.

Pursuant to a Power of Attorney on file in this office, a copy of this letter is being sent to the authorized representative. This ruling letter does not address the applicability of any section of the Code or regulations to the facts submitted other than with respect to the sections described.

This ruling is directed only to the organization that requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

Please keep a copy of this ruling letter in your permanent records.

If you have any questions about this ruling, please contact the persons whose name and telephone number are shown above in the heading of this letter.

Sincerely yours,

Robert Choi
Director, Exempt Organizations
Rulings and Agreements